

Independent Police Review

Policy Review: Portland Police Bureau
Compliance with *Brady v. Maryland*

April 2017



Mary Hull Caballero
Auditor

Constantin Severe
IPR Director

Introduction

In *Brady v. Maryland* and later cases, courts have found that the United States Constitution requires prosecutors and law enforcement agencies to disclose evidence that helps prove the innocence of criminal defendants or that undermines the credibility of a government witness.

The Portland Police Bureau does not have a written policy that defines its *Brady* related duties or provide clear expectations to its officers, despite the efforts of some Bureau members. The Independent Police Review did not receive any records from the Police Bureau documenting that *Brady* related training has ever occurred. Interviews with command staff described a Police Bureau practice of providing *Brady* related information, in certain contexts, to local prosecutors.

Brady v. Maryland is now over 50 years old and well established. The Police Bureau's lack of a written *Brady* policy puts it outside of national best practice among police agencies. The failure to implement a well-crafted *Brady* policy has led to an ad hoc practice that is poorly understood by its members and the public. Given the Police Bureau's obligation to engage in constitutional policing, the lack of a *Brady* policy undermines public trust in the Police Bureau and the City. Additionally, the Police Bureau's failure to implement a *Brady* policy exposes the City to significant financial liability. Recommendations from a state wide *Brady* workgroup and police policy organizations form a solid foundation for drafting a Police Bureau *Brady* policy.

Recommendations

Based on national best practices and constitutional case law, IPR makes the following recommendations:

- 1. The Police Bureau should develop a written *Brady* policy that clearly articulates what constitutes *Brady* material, both exculpatory and impeachment, and how notifications to supervisors and prosecutors are made.**
- 2. The Police Bureau should provide training to all its investigative personnel regarding their responsibility to properly document possible exculpatory *Brady* material and how to make notifications to supervisors and prosecutors.**
- 3. The Police Bureau should track all *Brady* related requests and their disposition in a centralized database.**

***Brady v. Maryland*: Duty to disclose material exculpatory evidence**

In a landmark 1963 ruling in *Brady v. Maryland*, United States Supreme Court held:

*Suppression by the prosecution of evidence favorable to an accused... violates due process where evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.*¹

In *United States v. Bagley*, the Court provided the following definition for material evidence:

*...evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different*²

The *Bagley* Court found that the American system of justice suffers when any accused is treated unfairly. The failure by a prosecutor to turn over to a defendant material evidence could lead to reversal of a conviction.

Courts have found that prosecutors have to disclose all favorable evidence to criminal defendants, including exculpatory and impeachment evidence. Exculpatory evidence is any information that would likely reduce the likelihood that a criminal defendant would be found guilty or reduce their punishment.³ Impeachment evidence is any information that would reduce the credibility of a government witness.⁴ Importantly, a defendant does not need to make a request for *Brady* material.⁵

As most of the cases following *Brady* revolve around the duty of prosecutors, a natural question has been what duty does a police agency have to disclose material evidence in its possession? In *Kyle v. Whitley*, the Supreme Court partially answered the question, by holding that prosecutors have a duty to learn of any favorable evidence known to others working on its behalf, including police agencies.⁶

A *Brady* violation requiring reversal of a conviction can occur when evidence is withheld by police investigators, with or without a prosecutor's knowledge.⁷ The Ninth U.S. Circuit Court of Appeals has expressly rejected the argument that disclosure of material evidence is only the obligation of prosecutors, out of the fear that it would create a perverse incentive where *Brady* evidence is not turned over to prosecutors by police agencies in a bid to prevent its production to defendants.⁸

¹ 373 U.S. 83, 87 (1963).

² 473 U.S. 667, 682 (1985).

³ *Giglio v. United States*, 405 U.S. 150,154 (1972).

⁴ *Milke v. Ryan*, 711 F. 3d 998 (9th Cir. 2013).

⁵ *Bagley* at 680.

⁶ 514 U.S. 419 (1995).

⁷ *Youngblood v. West Virginia*, 547 U.S. 867, 869(2006).

⁸ *Tennison v. San Francisco*, 570 F. 3d 1078, 1087 citing *United States v. Blanco*, 392 F.3d 382, 388 (9th Cir. 2004).

In *Tennison v. City and County of San Francisco*, the Ninth Circuit found that investigative agencies have the same duty as prosecutors in providing exculpatory evidence to defendant.⁹ A lower court found that two police investigators failed to turn over exculpatory evidence gathered during a murder investigation to John Tennison and his co-defendant. *Tennison* also highlights the risk for municipalities of being held civilly liable under 42 U.S.C 1983 for failing to turn over exculpatory evidence to criminal defendants. John Tennison spent 14 years in prison prior to his release, and San Francisco later paid a settlement of \$4.5 million to resolve his civil rights violation lawsuit.¹⁰

In *Milke v. Ryan*, the Ninth Circuit found a violation of *Brady* and overturned the conviction of a murder defendant who had been sentenced to death, where the prosecution failed to disclose the “long history of lying under oath and other misconduct” of a Phoenix Police detective, much of it documented in multiple Internal Affairs investigations.¹¹ The detective had been the prosecution’s star witness.

In *United States v. Olsen*, the Ninth Circuit found that material gathered in “ongoing investigations” of government witnesses to be favorable evidence under *Brady* requiring disclosure to criminal defendants by the prosecution.¹² The *Olsen* court states unequivocally that a final decision by the witness’ employer that he had engaged in misconduct was irrelevant to the government’s duty to comply with *Brady*:

*Indeed, information bearing adversely on the credibility of a prosecution witness is favorable under Brady regardless of whether it was part of any investigation at all.*¹³

Within the Ninth Circuit the duty of police agencies to disclose *Brady* material has become settled law. There is less clarity as to whom the police agency is required to turn over the *Brady* material. A recent U.S. District Court of Oregon case approvingly cites a Sixth Circuit decision explaining the difference in disclosure requirements for a police agency and a prosecutor:

*...the role that a police officer plays in carrying out the prosecution’s Brady obligation is distinct from that of a prosecutor... Brady obliges a police officer to disclose material exculpatory evidence only to a prosecutor rather than directly to the defense.*¹⁴

Access to an officer’s personnel file is restricted by law and practice

In Oregon, there is a presumption that public records will be disclosed unless there is an exemption.¹⁵ Yet a public employer may not disclose information related to an investigation of

⁹ *Id.*

¹⁰ Jaxon Van Derbeken, *S.F. May Pay Freed Man \$4.5 Million Settlement*, San Francisco Chronicle, June 4, 2009.

¹¹ *Milke* at 998.

¹² 704 F. 3d 1172, 1190 (9th Cir. 2013).

¹³ *Id.*

¹⁴ *Cannon v. Polk County/Polk County Sheriff*, 68 F. Supp. 3d 1267,1279 citing 747 F. 3d 378, 379 (6th Cir. 2014).

¹⁵ *City of Portland v. Anderson*, 163 Or. App. 550 (1999).

employee misconduct, regardless of whether discipline is imposed, unless public interest requires disclosure.¹⁶ Nationally, there are a variety of statutory approaches as to how officer personnel files are treated and who is allowed to access them. In Florida, all disciplinary findings contained within an officer's personnel file are publically available, which would allow defense counsel direct access to possible *Brady* material.¹⁷ California, on the other hand, treats all officer disciplinary records as confidential, requiring good cause for disclosure, even to prosecutors.¹⁸

In Portland, criminal defendants seeking access to an officer's personnel file may file a subpoena requesting documents be made available prior to trial.¹⁹ The City of Portland has maintained a practice of challenging all subpoenas received from defense counsel requesting part or all of an officer's disciplinary file. A deputy city attorney stated that he could not remember the City losing a motion to quash a subpoena in over a decade.

An additional factor in the City's reticence in turning over an officer's disciplinary file is its collective bargaining agreement with the Portland Police Association, which requires that if the City "reprimands or disciplines" a member it is done "in a manner that is least likely to embarrass the officer."²⁰ The City has interpreted this provision as preventing it from disclosing the information contained within an officer's disciplinary file without strong justification.

Given the strong structural hurdles to the City providing criminal defendants or their attorneys access to disciplinary files, it makes the City's disclosure of possible *Brady* material to prosecutors even more critical.

Senate Bill 492 adds disclosure requirements to Oregon law

In 2013, the Oregon Legislature codified the disclosure requirements of *Brady* when it modified ORS 135.815, a statute that governs required discovery to defendants by prosecutors. The new provisions require that prosecutors disclose to defendants any material that tended to:

- Exculpate the defendant
- Negate or mitigate the defendant's guilt or punishment
- Impeach a witness that the district attorney intended to call at trial

The legislature made clear that the amended ORS 135.815 did not go further than preexisting provisions under the state and federal constitutions. Additionally, it stated its intent not to create a new statutory right for defendants to access police personnel or internal affairs files.

¹⁶ Oregon Revised Statute(ORS) 181A.830(3), 192.501(12).

¹⁷Jonathan Abel, *Brady's Blind Spot: Impeachment Evidence in Police Personnel Files and the Battle Splitting the Prosecution Team*, 67 Stanford Law Review 743, 767 (2015).

¹⁸ *Id.* at 760.

¹⁹ ORS 136.580(2).

²⁰ *Labor Agreement Between the Portland Police Association and the City of Portland*, Article 20.2 (2013).

While Senate Bill 492 did not expand *Brady* in Oregon, its passage led to the creation of a workgroup comprised principally of prosecutors, representatives of police agencies across the state, police fraternal organizations, and attorneys who represent officers in labor contexts. The City of Portland was represented at the workgroup by the Captain of the Professional Standards Division and an attorney from the City Attorney's Office.

The workgroup's stated objective was to "determine whether consistent, statewide practices could be developed for Oregon's public safety communities." The workgroup memorialized its work in a March 31, 2014, work paper directed at Oregon prosecutors and law enforcement. The work paper included recommended best practices and guidelines. For the purposes of this review, the workgroup had two significant recommendations for law enforcement agencies:

1. Agencies should implement comprehensive and consistent *Brady* policies reflective of national best practices.
2. Agencies should adopt policies and employment practices that allow disclosure when an employee has:
 - a. Been untruthful
 - b. Committed a crime
 - c. Been biased
 - d. Suppressed evidence

U.S. Attorney's Office requests *Brady* information from the Police Bureau

The U.S. Department of Justice has a policy that memorializes the requirements of *Brady* and its expansion in *Giglio v. United States*. The policy states that material exculpatory and impeachment evidence in the possession of its prosecution team, including local and federal law enforcement, will be provided to criminal defendants.²¹

Police Bureau members interviewed by IPR stated that the Police Bureau regularly receives *Brady* related inquiries from the U.S. Attorney's Office regarding Portland officers who are witnesses in federal prosecutions. IPR reviewed memoranda sent to the U.S. Attorney's Office by the Police Bureau in response to their inquiries about whether a Police Bureau member listed as a witness had potential *Brady* issues. The memos generally state that the Police Bureau has reviewed the witness officer's personnel file and Internal Affairs complaint history to determine whether the member had credibility and truthfulness issues under *Brady*.

Multnomah County District Attorney creates an impeachment disclosure index

In October 2014, the Multnomah County District Attorney's Office created a written policy outlining how it handled its duties under *Brady*. The District Attorney's Office recognized that attorneys within the office have a constitutional and ethical duty to comply with *Brady*. Impeachment evidence pertaining to state witnesses would be maintained in a Possible Impeachment Disclosure (PID) Index. Findings by a law enforcement agency that its employee

²¹ USAM 9-5001.

had engaged in dishonesty, had a criminal conviction, or provided false testimony may lead the District Attorney's Office to place a state witness on the index. The index would store *Brady* material in a centralized location, accessible to all prosecutors. Ideally, creation of such a computerized system would allow discovery to a defendant to occur without any unreasonable delays. Officers who are entered in the PID Index may contest their inclusion.

Criminal defense bar questions City's approach

Several members of the local criminal defense bar were interviewed regarding the Police Bureau's practices regarding *Brady* and could not recall being provided notice of *Brady* material related to a Portland officer in a non-federal prosecution. Several attorneys viewed the City's failure to create a *Brady* policy as an intentional attempt to shirk its constitutional responsibilities.

Multiple fact finders in Portland's oversight system can differ on findings

In Portland's police accountability system, there are multiple fact finders who make recommend findings with the final decision resting with the police chief and the police commissioner. In the average case, the involved officer's commander makes a recommended finding that is reviewed by an assistant chief, Internal Affairs, and IPR, each of whom have the ability to disagree with the findings (controvert) and refer the case to the Police Review Board. The Board is a fact finding body that makes recommendations as to findings and discipline to the chief. As required by City Code, the Board - through its outside facilitator - is required to provide a memo describing how it voted and the rationale provided by the voting members for their actions. Twice a year the Police Bureau releases a report detailing the cases handled by the Board.

Each fact finder makes their own determination based on the preponderance of the evidence and has complete, unfettered access to the investigative case file.

Without a policy the Police Bureau relies on case-by-case judgment to disclose information to prosecutors

A deputy city attorney described the Police Bureau's practice of complying with its *Brady* obligations as an attempt to balance its role as an employer with its duty as a public safety agency. As explained to IPR, what triggers a Police Bureau *Brady* disclosure to prosecutors is a sustained finding by either the chief or the police commissioner, involving investigated allegations such as untruthfulness or criminal conduct. Disclosure to the District Attorney's Office includes a cover memo, final discipline letter, and a memo from the Police Review Board. Prosecutors are not provided direct access to an officer's personnel file.

A former police chief expressed frustration with conflicting advice from the City Attorney's Office; at one point *Brady* was described to him as the District Attorney's duty only, with the Police Bureau having no obligation.

A deputy city attorney interviewed by IPR voiced a fear that if the Police Bureau turned over confidential information to the District Attorney's Office from an officer's personnel file, it would end up in the hands of a criminal defendant.

In multiple interviews with Police Bureau members and other city employees, the Police Bureau's practice was described as one that had evolved over time based on internal deliberation and interaction with the District Attorney's Office. The Police Bureau does not have a written policy that governs how it complies with its *Brady* obligations. The Police Bureau is currently working on creating a written *Brady* policy.

No Bureau member interviewed by IPR could recall any training by the Police Bureau to its members on compliance with *Brady*.

Truthfulness

The ability to testify as a prosecution witness is an important duty of any member of law enforcement. With years of training and experience, a police officer can be a formidable government witness. At trial, a prosecutor will often have an officer testify to statements made to them by a defendant. The weight that a judge or jury will give to testimony by an officer may be irretrievably undermined by a credible allegation that the officer has previously engaged in untruthful behavior.

With the majority of criminal cases being resolved through plea bargains, the importance of the documents created by an officer, such as a police report or a search warrant affidavit, has only increased.

In law enforcement circles, it is often stated that a sustained allegation of untruthfulness marks the end of an officer's career. At the Police Bureau, a member who has a sustained untruthfulness allegation faces presumptive discipline of termination based on the discipline guide. Additionally, an officer who receives a sustained finding of untruthfulness and is terminated or resigns under investigation may face decertification by the Oregon Department of Public Safety Standards and Training (DPSST) and would be unable to work within the state as a police officer.

It is not uncommon for findings to vary among fact finders. Of 48 closed investigated cases since 2010 with an allegation of untruthfulness, IPR found that in 11 cases Police Bureau members had an allegation sustained. In nine cases, officers resigned during the investigation and in two cases an employee was terminated for a sustained truthfulness allegation. Yet, in five cases, where the Police Review Board recommended a sustained finding of untruthfulness, the chief disagreed and imposed a different finding: unproven in four cases and exonerated in one. In one case, the Police Review Board recommended a finding of unproven after the officer's commander recommended a finding of sustained. In another case, Internal Affairs disagreed with the officer's commander and recommended a finding of sustained. When the case went to the Police Review Board, it recommended a finding of unproven.

In a recent case, an officer was terminated by the Police Bureau after an investigation into multiple allegations, including one involving untruthfulness. The officer was later reinstated after reaching a settlement with the City. The settlement also included changing a sustained finding of untruthfulness to not sustained.

As of the writing of this review, there are several current members of the Police Bureau against whom allegations of untruthfulness had been sustained by their precinct commander or the Police Review Board but not ultimately sustained by the chief or the police commissioner.

Changed Allegations

There are several cases in which an allegation of untruthfulness was recategorized as either a conduct or report-writing violation. Given the lack of clarity of the Police Bureau's current practice of disclosing to local prosecutors sustained allegations not involving untruthfulness or criminal conduct, there is a risk that *Brady* information may not be disclosed. There may be officers who have engaged in behavior which the Police Bureau believes occurred, and which may affect credibility, but which the Police Bureau is not categorizing as untruthful behavior, and thus not disclosing to prosecutors.

In one case investigated by Internal Affairs, the original allegation was:

Officer A made a false statement in a sworn affidavit (CONDUCT) (Directive 310.50 – Truthfulness)

The allegation was changed at the Police Review Board to the following:

Officer A made a false statement in a sworn affidavit (CONDUCT) (Directive 310.00 – Conduct, Professional)

The revised allegation was sustained by the Board, and the officer was disciplined. Under the Police Bureau's current practice, the first version of the allegation would require notification to prosecutors, while it is unclear whether the second would require disclosure.

Exculpatory Evidence

While discussions regarding *Brady* obligations of police agencies often revolve around evidence that may be used to impeach an officer witness, another critical area is evidence that may be exculpatory to a criminal defendant. Police officers often have a role in collecting and documenting evidence gathered during a criminal investigation. As *Brady* and its progeny show, police agencies have a duty to disclose exculpatory evidence.

During this review, the Police Bureau did not produce any documentation that provided guidance as to the Bureau's approach to exculpatory evidence.

Best Practice / Outside Law Enforcement Agencies

The International Association of Chiefs of Police (IACP) has created a model policy for *Brady* material, recommending disclosure in instances where an officer has engaged in excessive force, untruthfulness, dishonesty, or bias. Jurisdictions as diverse as San Francisco, Los Angeles, Denver, New Orleans, Austin, and Spokane have created policies that cover the agencies' duty to disclose *Brady* material. Several large police departments have created *Brady* policies only in the wake of widely publicized incidents where the failure to disclose to prosecutors the disciplinary histories of officer witnesses led to the dismissal of pending charges or the reversal of criminal convictions.²²

In Oregon, several smaller police agencies have implemented policies on the disclosure of *Brady* related material.²³

Case Study: Lieutenant's Memo

The Police Bureau's conflicted approach to complying with its *Brady* obligations is exemplified by what occurred when a Police Bureau lieutenant, then assigned to the Professional Standards Division, became aware that the Police Bureau had failed to disclose disciplinary cases that had *Brady* implications to the Multnomah County District Attorney's Office.

On January 3, 2013, the lieutenant wrote a memo to the Chief with a subject line: "Legal duty to disclose exculpatory evidence." It documented concerns regarding the Police Bureau's *Brady* obligations and its possible civil liability for failing to disclose exculpatory evidence. The lieutenant noted there were at least five members of the Police Bureau who had credible allegations of untruthfulness violations filed against them. In each of those cases either the involved officer's commanding officer or the Police Review Board had recommended the allegations be sustained but they ultimately were not sustained.

The lieutenant made the following observation in his memo:

I believe it is the Bureau's legal and ethical obligation to provide this information to the Multnomah County District Attorney's Office and U.S. Attorney's Office so they are fully apprised of any potential issues with the officers' credibility.

On January 10, 2013, the lieutenant called the Multnomah County District Attorney and told him that the Police Bureau "may be withholding exculpatory evidence based upon a series of recommended Performance Review Board findings." The lieutenant explained that the relevant cases had been posted online by the Police Bureau in the form of the public reports of the

²² Richard Lisko, *Agency Imperative to Disclose Brady v. Maryland Material to Prosecutors*, Police Chief Magazine 78 (February 2011): 12, 13.

²³ Lincoln County Sheriff's Office, Philomath Police Department, Sutherlin Police Department, Talent Police Department, University of Oregon Police Department, Tigard Police Department, and Medford Police Department.

Police Review Board. The lieutenant later wrote to a superior that he did not share any confidential information with the District Attorney.

The lieutenant had not sought permission from supervisors prior to his contact with the District Attorney. This would later be the source of concern within upper levels of the Police Bureau.

On January 25, 2013, the lieutenant completed an additional memo requested by supervisors that explained his actions up to that point. In closing the lieutenant noted:

Chief Reese said recently during a hiring and promotion ceremony that we should above all else protect the Constitution and do the right thing even when it is hard.

On January 31, 2013, the lieutenant wrote a final memo at the request of the Director of Services, providing additional details regarding the five Police Bureau officers he believed to have “credible truthfulness allegations investigated by Internal Affairs and a majority of the fact finders have recommended the allegation be sustained.” The lieutenant included within his memo citations to relevant cases, comments of a King County, Washington, prosecutor regarding the practices of his agency, and a Seattle Times article describing the problems that the Seattle Police and the King County Sheriff’s Office had complying with their *Brady* obligations.

The cases cited by the lieutenant are listed below:

Case A

Allegation: Involved member was not truthful in statements to Internal Affairs regarding touching female employees. (CONDUCT) (Directive 310.50 – Truthfulness)

The involved member’s commanding officer recommended a finding of unproven. Both Internal Affairs and IPR controverted the case and the matter was referred to the Police Review Board. The chief found the allegation to be unproven.

Case B

Allegation: Involved member was untruthful in a memorandum and in Internal Affairs interviews regarding a telephone conversation that occurred with another member. (CONDUCT) (Directive 310.50 – Truthfulness)

The involved member’s supervisor recommended a finding of unproven. Internal Affairs controverted and recommended a finding of sustained. At the Police Review Board four members voted unproven and one voted sustained. The chief found the allegation unproven.

Allegation: Involved member wrote an inaccurate memo regarding a telephone conversation that occurred with another member. (CONDUCT) (Directive 315.30 – Unsatisfactory Performance)

All the fact finders recommended a sustained violation. The Police Review Board was unanimous. The chief found the allegation sustained.

Case C

Allegation: Involved member was untruthful during both Internal Affairs interview accounts of report writing sequences for PPB case ##-##### (CONDUCT) (Directive 310.50 – Truthfulness)

All fact finders recommended sustained findings. The Police Review Board voted unanimously to sustain the allegation. The chief found that the member's actions were exonerated.

Case D

Allegation: Involved member was untruthful in his response to his Sergeant when he was asked why he was out of his assigned district. (CONDUCT) (Directive 310.50 - Truthfulness)

All fact finders recommended a sustained finding. The Police Review Board unanimously recommended a sustained finding. The chief found the allegation unproven with a debrief.

Case E:

Allegation: Involved member was untruthful with an outside police department in an interview regarding a driving incident. (CONDUCT) (Directive 310.50 - Truthfulness)

All fact finders prior to the Police Review Board recommended a sustained finding. At the Police Review Board, four members recommended a finding of unproven and one voted for a recommended finding of sustained. The chief found the allegation was unproven.

Allegation: Involved member was untruthful in his Internal Affairs interview regarding a driving incident (CONDUCT) (Directive 310.50 – Truthfulness)

All fact finders prior to the Police Review Board believed that the member's actions constituted a violation of policy and recommended a sustained finding, except the IPR representative who recommended a finding of unproven with a debrief. The Police Review Board unanimously recommended a finding of unproven. The Chief imposed a finding of sustained.

It is apparent from a review of contemporaneous records that the lieutenant's supervisors were perplexed and frustrated by his actions. In an undated memo on the letterhead of an assistant chief, a list of questions to be asked of the lieutenant by his immediate supervisor includes several that revolve around the appropriateness of his decision to notify the District Attorney and his failure to notify supervisors.

The lieutenant was subsequently reassigned and transferred to a precinct.

Method of Review

This review had three areas of inquiry:

- 1) How the Police Bureau's current policy and practice define *Brady* material and an officer's constitutional duty.
- 2) Training received by officers on their obligations under *Brady*.
- 3) Police Bureau's current policy on disclosing to prosecutors when the Police Bureau has material that would fall under *Brady*.

To facilitate this review, IPR requested all relevant documents including Police Bureau policy and procedures manual and Standard Operating Procedures that provide the Bureau's expectations for its officers. IPR also requested any training material or documents that explained the Police Bureau's current or historical training on *Brady* obligations. The Police Bureau did not respond to IPR's requests and failed to produce any documents. IPR then sought documents from individual members of the Police Bureau. Documents provided by those members formed the basis of this review.

IPR staff conducted interviews with Police Bureau personnel, City staff, local prosecutors, and criminal defense attorneys.

As stated at the beginning of this report and discussed throughout, IPR recommends that the Police Bureau take the following actions:

Recommendations:

- 1. The Police Bureau should develop a written *Brady* policy that clearly articulates what constitutes *Brady* material, both exculpatory and impeachment, and how notifications to supervisors and prosecutors are made.**
- 2. The Police Bureau should provide training to all its investigative personnel regarding their responsibility to properly document possible exculpatory *Brady* material and how to make notifications to supervisors and prosecutors.**
- 3. The Police Bureau should track all *Brady* related requests and their disposition in a centralized database.**



CITY OF PORTLAND, OREGON



Bureau of Police

Ted Wheeler, Mayor
Michael W. Marshman, Chief of Police
1111 S.W. 2nd Avenue • Portland, OR 97204 • Phone: 503-823-0000

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April 25, 2017

TO: Constantin Severe, Director
Independent Police Review

SUBJECT: IPR Brady Review

On March 30, 2017 IPR delivered a report on IPR's review of PPB's policy and training on the landmark *Brady v. Maryland* decision which speaks to a law enforcement agency's obligation to disclose evidence that helps prove the innocence of criminal defendants or that undermines the credibility of a government witness.

The report provides an introduction to the issues addressed by the report, summaries of relevant legal decisions, unattributed commentary from past members of PPB and the legal community, anonymized excerpts from administrative investigations and three recommendations to PPB.

A follow up meeting was held on April 17, 2017 in the Chief's Office Outer Conference room to discuss IPR's policy review. Members from IPR, PPB, City Attorney's Office and District Attorney's Office were present.

The District Attorney's Office presented details on their system for evaluating Brady material and how the bureau should interact with that system. The City Attorney's Office presented historical information of how the Bureau has interacted with that system as well.

IPR made the following three recommendations to PPB:

- 1) The Police Bureau should develop a written policy that clearly articulates what constitutes *Brady* material, both exculpatory and impeachment, and the procedure for making notifications to supervisors and prosecutors.

PPB response:

PPB agrees with this recommendation and has assigned the Policy Development Group to conduct the appropriate research, identify qualified subject matter experts, consult with stakeholders (District Attorney, Investigators, IPR, etc.), and develop a draft policy for universal review within ninety days.

- 2) The Police Bureau should train all investigative personnel regarding their obligations under the *Brady* policy.

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PPB response:

PPB agrees with this recommendation and has assigned the Detective Division Commander and the Training Division Captain to jointly develop and recommend through written report to the Chief's Office a training program for investigative personnel that both sufficiently instructs members on their obligation under *Brady* and ensures comprehension of the newly crafted *Brady* policy. This training plan will be prepared and ready for implementation within 30 days from the completion of the *Brady* policy so that it may be delivered when the new policy is enacted for the Bureau.

- 3) The Police Bureau should track all *Brady* related requests and their disposition in a centralized data base.

PPB response:

PPB agrees with this recommendation and has assigned the Professional Standards Captain and Strategic Services Captain to develop a secure centralized database capable of tracking all *Brady* requests to PPB and all material provided by PPB to the District Attorney in accordance with the PPB *Brady* policy whether a request was made or not. This database will be operational within sixty days and include an audit plan for ensuring it is used in accordance with the *Brady* policy.



MICHAEL W. MARSHMAN

Chief of Police